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# COLUMBIA LAW REVIEW

Issued monthly during the Academic Year by Columbia Law Students

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SUBSCRIPTION PRICE, \$4.50 PER VOLUME

60 CENTS PER NUMBER

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JUNE, NINETEEN HUNDRED AND TWENTY

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## NOTES

THE DEPORTATION OF ALIENS.—The first law authorizing the deportation from the United States of aliens there resident was passed in 1798. Five years before, France and England had begun a war, in the course of which they emulated each other in violations of American neutrality.

Citizen Genet's historic impertinence and Talleyrand's infamous attempts to bribe the American envoys, disclosed in the X. Y. Z. correspondence, brought the country to a pitch of excitement where the cry was for a war with France. At the height of this wave, the Federalists, determined to rid the country of foreign agitators, passed the Alien Act.<sup>1</sup> The law was limited to two years in its operation,—the courts never had an opportunity to pass upon it; but the storm of indignation which it raised was fatal to the party that originated it, and the condemnatory resolutions that it provoked from state legislatures were almost revolutionary in their import.<sup>2</sup> Thomas Jefferson considered the law "as merely an experiment on the American mind, to see how it will bear an avowed violation of the Constitution".<sup>3</sup>

Not for almost a century did Congress venture upon similar legislation. In 1892 an Act was passed to prohibit the entrance of Chinese persons into the United States; section six of this law provided for the deportation of those Chinese laborers already within the limits of the country who failed to procure a certificate of residence from the Commissioner of Internal Revenue.<sup>4</sup> The constitutionality of this section was upheld in *Fong Yue Ting v. United States*,<sup>5</sup> despite the vigorous dissent of Chief Justice Fuller, and Justices Brewer<sup>6</sup> and Field. The majority of the court refused to distinguish section six in principle from the rest of the Act: "The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."<sup>7</sup> The right of exclusion had been upheld by Justice Field in the *Chinese Exclusion Case*,<sup>8</sup> and the Immigration Act of March 3, 1891 had extended its exercise not only to Chinese laborers, but *inter alios*, to idiots, insane persons, paupers, those who had been convicted of felony, and polygamists; and provided that any alien entering the United States in violation of law might be returned within a year.<sup>9</sup>

The effect of the legislation so sustained has been to vest in the political departments of the government the power to expel aliens, to

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<sup>1</sup>(1798) 1 Stat. 570, authorizing the President to order deported "all aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof".

<sup>2</sup>The Virginia Resolutions of Dec. 21, 1798. Resolutions of the Kentucky Legislature, Nov. 10, 1798.

<sup>3</sup>The Virginia Report of 1799-1800, p. xiii.

<sup>4</sup>(1892) 27 Stat. 25, U. S. Comp. Stat. (1916) § 4320. The First Chinese Exclusion Act (1882) 22 Stat. 58, had no such provision.

<sup>5</sup>(1893) 149 U. S. 698, 13 Sup. Ct. 1016.

<sup>6</sup>"Whatever may be true as to exclusion, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens . . . The Constitution has no extra-territorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions . . . But the Constitution has potency everywhere within the limits of our territory". *Ibid.*, at p. 738.

<sup>7</sup>*Ibid.*, per Gray, J., at p. 707.

<sup>8</sup>*Chae Ghan Ping v. United States* (1889) 130 U. S. 581, 9 Sup. Ct. 623.

<sup>9</sup>(1891) 26 Stat. 1084, § 1; 1086, § 11.

be administered by executive authority, "except so far as the judicial department has been authorized or is required by the constitution to intervene".<sup>10</sup> This means that an alien is not deprived absolutely of an appeal to the courts.<sup>11</sup> But "the denial of a fair hearing" by the administrative officers "is the only foundation for any jurisdiction in a court to interfere on *habeas corpus*".<sup>12</sup> If there has been a "fair though summary" hearing, the ruling of the commissioner is final; and in any event, the merits of the cause are not subject to review on *habeas corpus*.<sup>13</sup> This is an amazing grant of power to the immigration inspectors;<sup>14</sup> the courts sit helpless before the most arbitrary procedure, and feel themselves constrained to dismiss writs "although with reluctance"<sup>15</sup> and although "if this order of deportation is carried out, it will be an act of cruel injustice".<sup>16</sup>

These precedents for the extension of administrative authority over matters thought by many to be properly the subject of judicial cognizance, and these sanctions for the almost arbitrary use of that power have recently been applied to a new series of cases. The Act of March 3, 1903, adds to the class of the idiots, lepers, and felons excluded "anarchists or persons who believe in or advocate the overthrow of the United States or of all government or of all forms of law or the assassination of public officials." The time within which these are deportable is extended to three years after entry.<sup>17</sup> The Immigration Act of February 5, 1917 somewhat broadens the definition of anarchists, and permits the deportation of undesirable aliens within

<sup>10</sup>United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 699, 18 Sup. Ct. 456; United States *v.* Lee Huen (D. C. 1902) 118 Fed. 442, 455.

<sup>11</sup>Thus aliens held for deportation by immigration inspectors by virtue of a warrant from the Secretary of the Treasury which does not contain the names of the prisoners, or any names *idem sonans*, are held without authority, and may be released by *habeas corpus*. United States *v.* Amor (C. C. A. 1895) 68 Fed. 885.

<sup>12</sup>In re Jem Yuen (D. C. 1910) 188 Fed. 350, 353; *Ex parte Lung Foot* (D. C. 1909) 174 Fed. 70.

<sup>13</sup>Chin Yow *v.* United States (1908) 208 U. S. 8, 28 Sup. Ct. 202.

<sup>14</sup>Thus the administrative order for deportation was held not to be reviewable judicially although the petitioner alleged that he had been born within the United States, and was therefore a citizen; United States *v.* Ju Toy (1905) 198 U. S. 253, 25 Sup. Ct. 644; whereas if he had admittedly been a citizen, he would not have been subject to deportation. United States *v.* Wong Kim Ark, *supra*, footnote 10, at p. 653. If the question of citizenship is one of law, not fact, the court will review it. Gonzales *v.* Williams (1904) 192 U. S. 1, 24 Sup. Ct. 177.

<sup>15</sup>In re Lea *et al.* (D. C. 1903) 126 Fed. 231. The petitioner, arrested by an inspector "whose word was his warrant", "at the mercy of the inspector who is accuser, arresting officer, prosecutor, judge, and jailor" was forced by threats to testify against herself, and was not permitted to communicate with an attorney. Cf. United States *v.* Gin Fung (C. C. A. 1900) 100 Fed. 389.

<sup>16</sup>United States *ex rel.* Canfora *v.* Williams (D. C. 1911) 186 Fed. 354, 356: the petitioner, aged 60, sixteen years a resident of this country, was refused re-admittance because he was likely to become a public charge, although his adult, native-born sons offered to put up a sufficient bond.

<sup>17</sup>(1903) 32 Stat. 1213, 1214, § 2; 1218, § 21. Section 38 (p. 1221) is a more extended definition of anarchy.

five years after entry.<sup>18</sup> Finally the Act of October 16, 1918, relating entirely to alien anarchists, removes all time limits from their deportation, and undertakes a detailed series of definitions of those persons considered anarchists, and of those societies membership in which renders an alien liable to deportation.<sup>19</sup> As a result the Alien Act of 1798 has been substantially reenacted,—without any indication that it is emergency or temporary legislation. Administrative and judicial decisions which have given an arbitrary force to statutes seemingly precise, are now to be applied to situations decried by our forefathers as inviting the abuse of authority.

And, indeed, the files of the Immigration Department,—as yet the chief source of information concerning procedure under the new Acts,—indicate that the methods applied in the Chinese deportation cases are being followed. Deportees have been held in custody more than a year without access to attorneys;<sup>20</sup> they have been deported without being able to procure legal advice.<sup>21</sup> Officers of the Department of Justice have been officially instructed to enter the homes of suspected aliens without search warrants,<sup>22</sup> and to stimulate aliens to activities which will render them liable to deportation.<sup>23</sup>

An analysis of the Act of 1918 indicates that these classes of aliens are now deportable: (1) Those who use force or violence to accomplish political ends; (2) those who advocate such use of force; (3) those who believe in the use of force; (4) those who disbelieve in organized government and are in favor of peaceful steps to realize their desires; (5) those who disbelieve in organized government, but advocate no measure of any kind; (6) those who are either passive members or active participants in a society which can be placed within one of these classes.

It is well to remember at this juncture that a resident alien owes an allegiance to the United States such as to render him punishable equally with citizens for any infraction of State and Federal laws.<sup>24</sup> And there are today both State and Federal laws punishing the

<sup>18</sup>(1917) 39 Stat. 874, 875, § 3; 889 § 19; U. S. Comp. Stat. (Supp. 1919) §§ 4289½b, 4289½jj.

<sup>19</sup>(1918) 40 Stat. 1012, c. 186; U. S. Comp. Stat. (Supp. 1919) § 4289½b (1).

<sup>20</sup>Report on American Deportation and Exclusion Laws, submitted to the New York Bureau of Legal Advice, Jan. 15, 1919. Reprinted by the National Civil Liberties Bureau, p. 7.

<sup>21</sup>*Ibid.*, 13.

<sup>22</sup>The New Republic 265 (Apr. 28, 1920): excerpt from instructions from the Department of Justice to its local officers at Boston: ". . . the meeting places and the residences of the members should be . . . searched. I leave it entirely to your discretion as to the method by which you should gain access to such places. If, due to the local conditions in your territory, you find that it is absolutely necessary for you to obtain a search warrant for such premises, you should communicate with the local authorities a few hours before the time for the arrests is set".

<sup>23</sup>Dept. of Justice instructions, Dec. 27, 1919: "If possible you [the District Attorney] should arrange with your under cover informants, to have meetings of the Communist party and the Communist Labor Party held on the night set . . . This, of course, will facilitate the making of arrests".

<sup>24</sup>Barrington v. Missouri (1907) 205 U. S. 483, 487, 27 Sup. Ct. 582; Carlisle v. United States (1872) 83 U. S. 147, 155.

advocacy of the use of force, or its actual use, to accomplish political ends; as well as membership in societies professing such doctrines.<sup>25</sup> But the third, fourth, and fifth classes of aliens subject to deportation are clearly beyond the scope of the most stringent criminal law. And yet judicial sanction has been given to the power of Congress to authorize the deportation of anarchists, defined so broadly as in effect to include these groups.<sup>26</sup>

The attitude of the Department of Labor has been shadowed in two of its recent decisions. *In re Engelbert Preis*,<sup>27</sup> Secretary Wilson declared, on the strength of excerpts from its manifesto,<sup>28</sup> that the Communist Party of America was an organization, such that it was mandatory upon him to take into custody alien members thereof and deport them. This position has been somewhat modified by Acting Secretary Post, who has said: "I shall assume . . . that Congress intended the Act of October 16, 1918 to be considered reasonably with reference to the individual knowledge and intent of persons drawn innocently into unlawful membership."<sup>29</sup>

It cannot be doubted that every government has the right to exclude and expel those aliens whose presence constitutes a real menace to its peaceful existence. And it must be recognized that in many cases of exclusion and in some cases of deportation it is not practicable to require a judicial review. But in view of the constant extension of the category of deportable offenses and the vigorous malpractice of the Departments of Justice and Labor, it is urged that judicial intervention be more generally authorized and demanded. The courts consider themselves helpless to intervene in the absence of Congressional authorization. But there is no disability in Congress to grant this power, and the situation seems to demand it. And finally, unless there is some factor which makes dangerous to the welfare of the nation acts committed by aliens which are not dangerous when committed by citizens, it is urged that Congress correlate more nearly our criminal law and our deportation law. It should be recognized that even the most recent extensions of our criminal law, which have disregarded completely the common law limits of conspiracy and solicitation, do not take cognizance of many of the situations which make an alien amenable to deportation.

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<sup>25</sup>20 Columbia Law Rev. 232; 20 Columbia Law Rev. 700, *infra*.

<sup>26</sup>Even "if the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent". *Turner v. Williams* (1904) 194 U. S. 279, 24 Sup. Ct. 719.

<sup>27</sup>10 Monthly Labor Review (U. S. Dept. of Labor) No. 3, p. 218.

<sup>28</sup>Some of the excerpts: "The proletarian class struggle is essentially a political struggle . . . The objective is the conquest by the proletariat of the power of the state . . . The parliamentarism of the Communist Party performs a service in mobilizing the proletariat against capitalism, emphasizing the political character of the class struggle . . . The Communist Party shall participate in mass strikes, not only to achieve the immediate purpose of the strikes, but to develop the revolutionary implications of the mass strikes".

<sup>29</sup>The Case of Thomas Truss, reported in 44 The Survey 144 (April 24, 1920) by F. F. Kane, ex-U. S. Attorney for the Eastern District of Pennsylvania.